FILED
AUG 12 1994
OFFICE OF THE CLERK

(3)

No. 94-73

In The

Supreme Court of the United States

October Term, 1994

SOUTHWESTERN BELL TELEPHONE COMPANY,

Petitioner,

v.

OKLAHOMA CORPORATION COMMISSION,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Oklahoma

BRIEF IN OPPOSITION

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Dated: August 12, 1994

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QUESTIONS PRESENTED

(1) Whether a state court's decision to deny recusal of an elected commissioner in a pending state ratemaking proceeding is ineligible for review by this Court, because the decision is not a final order; and

(2) Whether a state court complies with due process when the court denies a utility's petition to recuse a commissioner in a pending ratemaking proceeding, but will provide the utility with an opportunity, after the commission issues its rate order, for the court's review in its independent judgment to determine whether the rate order is confiscatory and whether the utility was denied the right to make a fair presentation of its case.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 6

ARGUMENT 7

I. THE STATE COURT'S DECISION IS NOT A FINAL ORDER AND THEREFORE DOES NOT QUALIFY FOR REVIEW BY THIS COURT ... 7

A. The Oklahoma Supreme Court's decision is not eligible for review under the finality doctrine as it is applied to a decision of the highest court of a state 7

B. Finality cases involving appeals within the federal court system do not apply 10

C. Finality cases involving writs of prohibition do not apply 11

D. SWB will not suffer irreparable harm if this Court denies certiorari at the present stage of the proceedings 12

II. THE STATE COURT'S DISCUSSION OF THE RULE OF NECESSITY IS ONLY ADVISORY AND IS THEREFORE NOT REVIEWABLE BY THIS COURT 13

III. THE STATE COURT'S DECISION DOES NOT CONFLICT WITH ANY OF THIS COURT'S DECISIONS, AND DOES NOT SIGNIFICANTLY CONFLICT WITH DECISIONS OF OTHER STATE COURTS..... 13

TABLE OF CONTENTS – Continued

Page

A. The state court's decision does not conflict with any of this Court's precedents 14

1. Ratemaking is legislative in nature .. 14

2. Procedural due process, as developed in adjudicative proceedings, does not necessarily apply in non-adjudicative proceedings 14

3. The due process rights of regulated parties to ratemaking are satisfied by judicial review, in the independent judgment of the state court, of (1) the rate order, to protect against the imposition of an unreasonable or confiscatory rate, and (2) the fundamental fairness of the proceedings, to guarantee that the utility has a proper opportunity to create a fair record of its case during the ratemaking proceeding ... 15

4. The Federal Administrative Procedure Act does not require application of a judicial standard for ratemaking 18

5. The rule of necessity is correctly stated in the Oklahoma Supreme Court's opinion 18

B. Conflicts with other state courts are not sufficiently significant to justify the grant of certiorari 19

IV. THE STATE COURT HAS CORRECTLY DECIDED THE FEDERAL CONSTITUTIONAL ISSUE 21

TABLE OF CONTENTS – Continued

Page

A. The state court properly held that ratemaking is legislative, and the court adequately protected the due process rights of the utility 21

B. Assuming due process requires ratemaking to be characterized as something other than legislative, the state court committed harmless error 22

1. If individualized ratemaking is rulemaking 22

2. If individualized ratemaking is adjudicative in nature 23

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986) 23, 24

Association of National Advertisers, Inc. v. Federal Trade Comm'n., 627 F.2d 1151 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980) 23

Bandini Petroleum Co. v. Superior Court of California, 284 U.S. 8 (1931) 11, 12

Bi-Metallic Investment Co. v. State Bd. of Equalization, 239 U.S. 441 (1915) 17

Black v. Cutter Laboratories, 351 U.S. 292 (1956) 13

Board of Education of City of Los Angeles v. Superior Court of California, 448 U.S. 1343 (1980) 11

Business and Professional People for the Public Interest v. Barnich, 614 N.E.2d 341 (Ill. App. Ct. 1993) 20

Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179 (1950) 16

Concrete Pipe and Products v. Construction Laborers Pension Trust, 113 S.Ct. 2264 (1993) 15

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 7, 8, 9, 10

Fisher v. District Court, 424 U.S. 382 (1976) 11, 12

Gibson v. Berryhill, 411 U.S. 564 (1973)..... 11, 24

Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) 10

TABLE OF AUTHORITIES – Continued

Page

Gulf States Utilities Company v. Louisiana Public Service Commission, 578 So.2d 71 (La. 1991) 21

Hammerstein v. Superior Court of California, 341 U.S. 491 (1951) 11

Henry v. Southwestern Bell Tel. Co., 825 P.2d 1305 (Okla. 1992) 17

Herb v. Pitcairn, 324 U.S. 117 (1945) 13

Hortonville Joint School District v. Hortonville Education Association, 426 U.S. 482 (1976) 25

Earle M. Jorgensen Co. v. City of Seattle, 665 P.2d 1328 (Wash. 1983) 21

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988) 24

Liteky v. United States, 114 S. Ct. 1147 (1994) 24

Londoner v. Denver, 210 U.S. 373 (1908) 17

Madruga v. Superior Court of California, 346 U.S. 556 (1954) 11

In Re Murchison, 349 U.S. 133 (1955) 24

New Orleans Public Service, Inc. v. Council of New Orleans, 491 U.S. 350 (1989) 14

North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156 (1973) 8

Northwestern Bell Telephone Co. v. Stofferahn, 461 N.W.2d 129 (S.D. 1990) 19, 23

Ohio Bell Tel. Co. v. Public Utilities Comm'n., 301 U.S. 292 (1937) 16, 22

Prentis v. Atlantic Coast Line, 211 U.S. 210 (1908) 14

TABLE OF AUTHORITIES – Continued

Page

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) 13

Ratepayers Coalition of Rochester v. Rochester Electric Light and Power Company, 571 A.2d 606 (Vt. 1989) 21

Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62 (1948) 10

Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549 (1947) 11, 12

Richardson-Merrell, Inc. v. Koller, 472 U.S. 424 (1985) 11

Southwestern Bell Telephone Co. v. Oklahoma Corporation Commission, No. 80,579, Slip. Op. (Okla. May 25, 1993) 3

Southwestern Bell Telephone Co. v. Oklahoma Corporation Commission, 873 P.2d 1001 (Okla. 1994).. *passim*

Tennessee Cable Television Assn. v. Public Service Comm'n., 844 S.W.2d 151 (Tenn. Ct. App. 1992) *review denied* (Tenn. 1992) 19, 23

Turpen v. Oklahoma Corporation Comm'n., 769 P.2d 1309 (Okla. 1989) 18

United States v. Florida East Coast Ry., 410 U.S. 224 (1973) 17

United States v. Will, 449 U.S. 200 (1980) 19

Ward v. Village of Monroeville, 409 U.S. 57 (1972)..... 24

West Ohio Gas Co. v. Public Utilities Comm'n., 294 U.S. 63 (1935) 16, 22

Withrow v. Larkin, 421 U.S. 35 (1975) 10, 25

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

5 U.S.C. § 551(4) 18
28 U.S.C. § 1257 ..... 6, 7

STATE CONSTITUTIONAL PROVISIONS

Okla. Const., art. IX, §§ 18 and 28 24

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To The Supreme Court Of Oklahoma

BRIEF IN OPPOSITION

The Respondent Oklahoma Corporation Commission submits this brief in opposition to the Petition for Writ of Certiorari filed by Southwestern Bell Telephone Company in the above referenced case.

STATEMENT OF THE CASE

Petitioner Southwestern Bell Telephone Company ("SWB") seriously misstates the holding of the Oklahoma Supreme Court in its Petition for Writ of Certiorari, and then builds a series of arguments on this unsound foundation. Respondent Oklahoma Corporation Commission

("Corporation Commission") therefore submits the following *Statement of the Case.*

The Corporation Commission derives its powers directly from the Oklahoma Constitution, and consists of three commissioners elected to staggered six-year terms by statewide ballot. It regulates public utilities, including Petitioner SWB. The Oklahoma Supreme Court exercises direct appellate jurisdiction over final rate orders of the Corporation Commission.

Bob Anthony was elected to the Corporation Commission in 1988, and took office in 1989. On October 2, 1992, Commissioner Anthony made a public announcement, which is set forth in the Oklahoma Supreme Court's opinion and reproduced in the appendix to the Petition ("Pet. App.") at 2a-3a. In summary, the announcement disclosed that Commissioner Anthony had worked with the Federal Bureau of Investigation since 1988 to investigate alleged corruption at the Corporation Commission; had received thousands of dollars in cash from individuals associated with regulated companies; had immediately given this cash to the FBI; and, more than a year before the announcement, had separately advised a SWB senior corporate officer and a SWB corporate attorney of the conduct of persons associated with their firm.

On the basis of this announcement, SWB sought Commissioner Anthony's recusal from a pending ratemaking proceeding (styled PUD-260) and from all pending and future SWB cases. After Commissioner Anthony declined to recuse himself and the Corporation Commission declined to override his decision, SWB sought a writ

of prohibition in the Oklahoma Supreme Court, in an attempt to compel the recusal of Commissioner Anthony.

The Oklahoma Supreme Court's first decision, rendered on May 25, 1993, granted the writ of prohibition. *Southwestern Bell Telephone Co. v. Oklahoma Corporation Commission*, No. 80,579, Slip. Op. (Okla. May 25, 1993), Pet. App. at 60a-74a. On April 13, 1994, however, on rehearing, the court withdrew its earlier opinion and denied the writ of prohibition. *Southwestern Bell Telephone Co. v. Oklahoma Corporation Commission*, 873 P.2d 1001 (Okla. 1994), Pet. App. at 1a-59a. SWB has filed a Petition for Writ of Certiorari, seeking this Court's review of the Oklahoma Supreme Court's April 13, 1994 decision.

In that decision, the Oklahoma Supreme Court discussed prior cases that characterize utility ratemaking as legislative, not adjudicative. The Oklahoma Supreme Court concluded that *judicial* standards of due process do not apply, and the writ of prohibition is not available. Furthermore, because the Corporation Commission derives its powers directly from the state constitution, the Corporation Commission is not governed by the provisions of the Oklahoma Administrative Procedures Act regarding the recusal of agency members and the appointment of temporary substitutes.

In denying the writ of prohibition, the Oklahoma Supreme Court addressed the remedies that will be available to SWB after the Corporation Commission renders a rate order. The court's statement of these remedies is part of the holding in this case, because the availability of

these remedies forms an integral part of the court's decision to deny relief at the present interlocutory stage of the pending ratemaking proceeding.

Once the Corporation Commission renders a rate order, SWB will have an opportunity to seek review in the Oklahoma Supreme Court on the grounds that (1) the rate order is unreasonable or confiscatory, or (2) SWB was prejudiced during the ratemaking proceeding by "unfair treatment and arbitrary rulings on evidence and testimony." Pet. App. at 13a. In performing this review, the Oklahoma Supreme Court "will exercise its independent judgment as to both the law and the facts." Pet. App. at 13a.

By reaffirming the availability of these remedies, the Oklahoma Supreme Court clearly demonstrated that due process applies. Substantive due process protects the utility company from the imposition of unreasonable or confiscatory rates; procedural due process guarantees the utility an opportunity to create a fair record of its case during the ratemaking proceeding, so that the reviewing court will have an adequate basis for determining whether the rate order is unreasonable or confiscatory.

The Oklahoma Supreme Court's opinion also discussed the relief that would be available against an allegedly biased commissioner if that official were exercising a *judicial* function. This discussion reached the conclusion that the rule of necessity would prevent the recusal of a commissioner who was exercising a judicial function, because no mechanism exists for the appointment of a substitute commissioner. Pet. App. at 15a. This part of the court's opinion is purely advisory to the

parties, in view of the court's determination that the ratemaking proceeding at issue in this case is legislative, not judicial.

The Petition includes SWB's protestation of innocence of any impropriety. Pet. at 3, n.1. The Corporation Commission expresses no opinion, at this stage of the proceedings, as to the culpability of any person or the source of the cash given to Commissioner Anthony. The resolution of those matters is pending in other tribunals.

The Petition is replete with erroneous interpretations of the Oklahoma Supreme Court's decision. According to SWB, for example, the question presented is "[w]hether States may deny all procedural due process protection in ratemaking proceedings, by labelling such proceedings 'legislative' and applying the Rule of Necessity." Pet. at i. Along similar lines, SWB's *Statement of the Case* in the Petition includes the assertion that "[t]he court made clear that its reasoning would compel it to deny *all* due process claims arising from ratemaking proceedings." Pet. at 7 (emphasis in original).

SWB's interpretation of the Oklahoma Supreme Court's decision is untenable. In fact, as indicated above, the Oklahoma Supreme Court clearly held that ratemaking proceedings before the Corporation Commission are indeed governed by due process. Furthermore, the Corporation Commission will demonstrate herein that the Oklahoma Supreme Court's interpretation of due process in ratemaking does not conflict with any of this Court's precedents.

This Court has not provided guidance on all details of due process that could arise in the ratemaking proceedings of state agencies. For the reasons discussed below, this case does not offer this Court an appropriate opportunity to provide additional guidance. The Petition for Writ of Certiorari should therefore be denied.

SUMMARY OF ARGUMENT

The Oklahoma Supreme Court's order in this case is not a final order under 28 U.S.C. § 1257, and is therefore ineligible for review by this Court. The Oklahoma Supreme Court issued this order during a pending ratemaking proceeding. The order denied SWB's Petition to disqualify Bob Anthony, one of the three elected members of the Oklahoma Corporation Commission. SWB will have the right of review by the Oklahoma Supreme Court after completion of the ratemaking proceeding.

Even if this Court determines that review is not completely barred for lack of finality, this Court should decline to review the portion of the Oklahoma Supreme Court opinion regarding the rule of necessity which may arise in an adjudicative proceeding in the future. This part of the decision is advisory, since the Oklahoma Supreme Court characterized the instant ratemaking proceedings as legislative, not adjudicative.

Even if this Court considers the merits, this Court should deny the Petition because the Oklahoma Supreme Court's opinion does not conflict with this Court's precedents, does not significantly conflict with the decisions of

other state courts, and correctly decides the federal constitutional issues. The Oklahoma Supreme Court will provide SWB with an opportunity, after the Corporation Commission issues its final rate order, for the court's review in its independent judgment to determine whether the rate order is confiscatory and whether SWB was denied the right to make a fair presentation of its case. The availabilty of this review satisfies the requirements of substantive and procedural due process. Further, the record contains no evidence that Commissioner Anthony had prejudged issues in the rate case.

ARGUMENT

I. THE STATE COURT'S DECISION IS NOT A FINAL ORDER AND THEREFORE DOES NOT QUALIFY FOR REVIEW BY THIS COURT.

SWB correctly cites 28 U.S.C. § 1257 as the basis for this Court's jurisdiction, but SWB makes no mention of that section's requirement that the state court's decision must be final. Because SWB does not discuss the crucial issue of finality, the Corporation Commission submits the following discussion.

A. The Oklahoma Supreme Court's decision is not eligible for review under the finality doctrine as it is applied to a decision of the highest court of a state.

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), summarizes four categories of situations in which this Court has reviewed state court decisions as "final," even

though the state proceedings are not yet complete. The Oklahoma Supreme Court's decision in this case does not fall within any of these four categories.

In the first *Cox Broadcasting* category are "those cases in which there are further proceedings . . . even entire trials . . . yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." *Id.* at 479. The instant case clearly does not come within this category, because the Oklahoma Supreme Court's denial of the petition to recuse Commissioner Anthony does not conclude due process opportunities for SWB or preordain the outcome of the Corporation Commission's rate-making proceeding.

In the second *Cox Broadcasting* category are cases in which the federal issue "finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Id.* at 480. This category is also inapplicable to the instant case. After the Corporation Commission renders its rate order, SWB will have the opportunity to appeal to the Oklahoma Supreme Court, which may decide the case in a manner that renders unnecessary the resolution of any federal question.

In the third *Cox Broadcasting* category are "those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the outcome of the case." *Id.* at 481. As an example of this category, *Cox Broadcasting* refers to *North Dakota State Bd. of Pharmacy v. Snyder's*

Drug Stores, Inc., 414 U.S. 156 (1973), which held that a state court decision is "final" when the state court remands a matter to a state agency with instructions to hold the hearing "sans [the] constitutional issue." The instant case is distinguishable. SWB will have the opportunity to litigate its constitutional claims during the remainder of the pending rate proceeding before the Corporation Commission and during any subsequent review in the Oklahoma Supreme Court or in this Court.

In the fourth and final *Cox Broadcasting* category are

> [T]hose situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come . . . [and] if a refusal immediately to review the state-court decision might seriously erode federal policy. . . .

420 U.S. at 482-83. *Cox Broadcasting* itself fits into this fourth category. That case arose from a state court decision which rejected challenges, under the First and Fourteenth Amendments, to a state law authorizing damage suits against the press for publishing the name of a rape victim whose identity is revealed in the course of a public prosecution. This Court was concerned that "a failure to decide the question now will leave the press in Georgia

operating in the shadow of the civil and criminal sanctions of a rule of law and a statute the constitutionality of which is in serious doubt. . . . " *Id.* at 486. In the instant case, no such serious consequences will flow from denial of the writ at this time. The state court's decision does not conflict with any of this Court's precedents, and does not leave utilities or anyone else in the precarious position this Court described in *Cox Broadcasting*.

In summary, none of the four *Cox Broadcasting* categories applies to this case. Nor does this case qualify as "final" under *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988) (state court decision is "final" when it determines federal preemption issue). Therefore, this Court should deny the writ on the ground, inter alia, that the state court decision is not final. This result would be consistent with *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62 (1948) (state court interpreted Oklahoma Corporation Commission's order as giving the regulated party three choices, and this Court held the state court decision was not "final").

B. Finality cases involving appeals within the federal court system do not apply.

A distinction must be made between (1) the finality requirement regarding this Court's review of decisions of the highest court of a state, as interpreted by the above cases, and (2) the finality requirement regarding appeals within the federal court system.

Regarding finality category (2), this Court has allowed interlocutory review in some cases. *See, e.g., Withrow v. Larkin*, 421 U.S. 35 (1975) (petitioner filed suit

in federal district court, before agency conducted hearing on license revocation; petitioner alleged that the combination of functions in state agency violated procedural due process; this Court entertained the merits of this pre-hearing challenge, but held the state system valid). *See also Gibson v. Berryhill*, 411 U.S. 564 (1973), discussed *infra*, IV, B.2. But this Court has disallowed interlocutory review in other cases. *See, e.g., Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985) (federal district court order denying motion to disqualify counsel is a "collateral order" and is not subject to interlocutory review by the court of appeals).

In any event, the cases under category (2) of finality (appeals within the federal court system) appear to be based on considerations of federal judicial economy, in contrast to the cases under category (1) of finality (this Court's review of highest state court decisions), which are based on considerations of federalism and deference due state courts.

C. Finality cases involving writs of prohibition do not apply.

The instant case is also distinguishable from finality cases arising from state court proceedings on writs of prohibition, such as *Bandini Petroleum Co. v. Superior Court of California*, 284 U.S. 8 (1931) and *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549 (1947) (noted in *Hammerstein v. Superior Court of California*, 341 U.S. 491 (1951)). *See also Madruga v. Superior Court of California*, 346 U.S. 556 (1954); *Fisher v. District Court*, 424 U.S. 382 (1976); *Board of Education of City of Los Angeles v. Superior Court of California*, 448 U.S. 1343 (1980) (Rehnquist, J., in chambers

opinion denying stay in state proceedings). Each of those cases arose from a state appellate court's denial of a writ of prohibition (or in the case of *Fisher v. District Court*, a writ of supervisory control). Furthermore, each of those cases indicated that a state court's decision on a writ of prohibition may be considered to be "final," even though other aspects of the case are still ongoing.

The instant case, however, is distinguishable from those cases. In all of those cases, prohibition was sought as a means of challenging the jurisdiction of a lower court to proceed. In contrast, SWB's petition to the state court for writ of prohibition was in the nature of a motion to recuse one of the three commissioners from participating in a proceeding, as noted in the Petition at 5-6. Therefore, the *Bandini/Rescue Army* doctrine does not transform the Oklahoma Supreme Court's decision in this case into a final order.

D. SWB will not suffer irreparable harm if this Court denies certiorari at the present stage of the proceedings.

SWB is not required to do anything until completion of the pending ratemaking proceedings and will have access to adequate remedies, in the form of state court review, as soon as the Corporation Commission completes those proceedings. Accordingly, SWB will not suffer irreparable harm if this Court denies the Petition for Writ of Certiorari at this interlocutory stage of the state ratemaking proceedings. Under the finality doctrine as applied to decisions of a state's highest court, absent an imminent decision in an incomplete state proceeding

which will cause an immediate detrimental impact upon property rights, this Court should deny the Petition for Writ of Certiorari and avoid intervening in the state proceeding. *See Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124-26 (1945).

II. THE STATE COURT'S DISCUSSION OF THE RULE OF NECESSITY IS ONLY ADVISORY AND IS THEREFORE NOT REVIEWABLE BY THIS COURT.

The Oklahoma Supreme Court's discussion of the rule of necessity deals only with *adjudicative* proceedings. The Oklahoma Supreme Court held that the ratemaking proceeding in the instant case is *legislative* and therefore did not base its decision on the rule of necessity; its discussion of this issue was merely advisory and therefore not reviewable by this Court. *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956) (this Court reviews state judgments, not statements in opinions of state courts); *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) (the power of this Court is to correct judgments, not to revise opinions).

III. THE STATE COURT'S DECISION DOES NOT CONFLICT WITH ANY OF THIS COURT'S DECISIONS, AND DOES NOT SIGNIFICANTLY CONFLICT WITH DECISIONS OF OTHER STATE COURTS.

The Oklahoma Supreme Court's decision in this case does not conflict with any of this Court's precedents. The decision appears to conflict, to a limited extent, with a

small number of decisions of other state courts but this limited conflict does not warrant review by this Court.

A. The state court's decision does not conflict with any of this Court's precedents.

According to SWB, the Oklahoma Supreme Court's decision in this case conflicts with this Court's precedents. Pet. at 8-11. SWB's conclusion is based on its erroneous portrayal of the Oklahoma Supreme Court's holding and SWB's conclusion that due process is met only if a judicial due process standard is adhered to rather than a legislative due process standard. A correct reading of the Oklahoma Supreme Court's decision makes clear the fact that it does not conflict with any of this Court's precedents.

1. Ratemaking is legislative in nature.

This Court has consistently affirmed state court holdings that ratemaking is legislative in nature. *Prentis v. Atlantic Coast Line*, 211 U.S. 210 (1908); *New Orleans Public Service, Inc. v. Council of New Orleans*, 491 U.S. 350 (1989) (summarizing *Prentis* and more recent cases citing it with approval). Accordingly, the Oklahoma Supreme Court's characterization of ratemaking as legislative does not conflict with this Court's precedents.

2. Procedural due process, as developed in adjudicative proceedings, does not necessarily apply in non-adjudicative proceedings.

Having characterized ratemaking as legislative in nature, the Oklahoma Supreme Court held that *judicial*

standards of due process do not apply to such proceedings. This part of the holding does not conflict with this Court's precedents.

As indicated recently in *Concrete Pipe and Products v. Construction Laborers Pension Trust*, 113 S. Ct. 2264 (1993), due process requires a neutral and detached judge for a judicial or quasi-judicial function, but not for a non-judicial function (which in *Concrete Pipe* involved an enforcement proceeding), provided a neutral adjudicator will conduct de novo review of all factual and legal issues. The Oklahoma Supreme Court decision is fully consistent with *Concrete Pipe*; the Corporation Commission need not conform to *judicial* standards of due process when conducting ratemaking proceedings which are legislative, but the Oklahoma Supreme Court will fully protect the rights of the utility and other parties by reviewing all factual and legal issues de novo.

3. The due process rights of regulated parties to ratemaking are satisfied by judicial review, in the independent judgment of the state court, of (1) the rate order, to protect against the imposition of an unreasonable or confiscatory rate, and (2) the fundamental fairness of the proceedings, to guarantee that the utility has a proper opportunity to create a fair record of its case during the ratemaking proceeding.

This Court has decided only a few cases regarding due process in individualized ratemaking proceedings, that is, ratemaking affecting only one or a small number of regulated parties. These decisions outline the elements

of due process. None of this Court's precedents require a state court to entertain a petition to recuse a commissioner in a pending ratemaking proceeding.

West Ohio Gas Co. v. Public Utilities Comm'n, 294 U.S. 63 (1935), held that if a commission establishes a rate that is above the confiscatory level, but gives the utility a suitable opportunity through evidence and argument to challenge the result, there is no denial of due process, even though there is irregularity or error in the proceedings. This Court insisted only on the fundamentals of a fair hearing. Along similar lines, *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292 (1937), held that a commission's failure to identify the sources of information of which it took official notice, that is, its failure to provide a fundamentally fair proceeding, violated the utility's right to due process.

The combined effect of both cases coincides with the result reached by the Oklahoma Supreme Court in the instant case. Due process is satisfied if the rate is not confiscatory, which is a matter of substantive due process, and if the ratemaking proceedings meet a standard of fundamental fairness, which is a matter of procedural due process. Fundamental fairness is preserved if the utility has an opportunity to create a fair record of its case during the ratemaking proceedings, thus ensuring that the reviewing court will have an adequate record on which to decide the substantive due process issue of confiscatory rates.

The Oklahoma Supreme Court's decision is also consistent with *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179 (1950), where this Court discussed the broad

powers of the Corporation Commission and reviewed the end result of the Corporation Commission's process, without discussing the procedure followed by the Corporation Commission in reaching that result.

SWB is mistaken in asserting that the Oklahoma Supreme Court's decision in this case conflicts with the decisions of this Court in *Londoner v. Denver*, 210 U.S. 373 (1908); *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915); and *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973). Pet. at 8-9. These precedents hold that a party whose individual rights are at stake must have an opportunity "to support his allegations by argument, however brief; and, if need be, by proof, however informal." *Londoner*, 210 U.S. at 385. Obviously, SWB has fully enjoyed a highly elaborate version of this right throughout the pending ratemaking proceeding, which has been going on since 1986. SWB has consistently had the opportunity to present its arguments and its proof and will continue to have this opportunity in the future; SWB does not remotely suggest the contrary. Accordingly, these proceedings conform fully to the requirements of *Londoner*, *Bi-Metallic* and *Florida East Coast*.

The Oklahoma Supreme Court held simply that *judicial* due process does not apply in these ratemaking proceedings. Pet. App. at 6a (emphasis added). The court did not preclude the application of other types of due process. To the contrary, the court guaranteed due process by reaffirming SWB's right to judicial review of the final rate order. The Oklahoma Supreme Court's precedents demonstrate the effectiveness of this guarantee. *See, e.g.*, *Henry v. Southwestern Bell Tel. Co.*, 825 P.2d 1305 (Okla.

1992) (Pet. App. at 75a-102a); *Turpen v. Oklahoma Corporation Comm'n*, 769 P.2d 1309 (Okla. 1989).

Therefore, the question is not whether SWB has a Fourteenth Amendment due process right to an individualized ratemaking proceeding. SWB clearly has that right, and it continues to exercise that right. The question, rather, is whether the Fourteenth Amendment due process right attendant to an individualized ratemaking proceeding includes the right to recuse Commissioner Anthony from a pending ratemaking proceeding under the circumstances of this case.

4. The Federal Administrative Procedure Act does not require application of a judicial standard for ratemaking.

SWB'S reflections on the impact of the federal Administrative Procedure Act (Pet. at 17) provide no support for SWB. First, the Act obviously does not define Fourteenth Amendment due process or weaken this Court's longstanding precedents. Second, the Act includes ratemaking in the definition of rulemaking, 5 U.S.C. § 551(4), and therefore does not require an adjudicative process in ratemaking.

5. The rule of necessity is correctly stated in the Oklahoma Supreme Court's opinion.

As discussed in II, *supra*, the portion of the Oklahoma Supreme Court's decision discussing the rule of necessity is not subject to review, as it was merely advisory to the parties in the context of the ratemaking. Assuming,

arguendo, that this portion of the decision is reviewable, it correctly stated and applied this Court's precedent established in *United States v. Will*, 449 U.S. 200 (1980).

B. Conflicts with other state courts are not sufficiently significant to justify the grant of certiorari.

State courts in South Dakota, Tennessee and Illinois have entertained motions for interlocutory judicial review of decisions by public utility commissioners which denied motions for recusal from pending regulatory proceedings. In *Northwestern Bell Telephone Co. v. Stofferahn*, 461 N.W.2d 129 (S.D. 1990), a motion by Northwestern Bell to disqualify a commissioner from pending and all future cases alleged that the commissioner's prior statements on deregulation demonstrated bias. Upon the commissioner's denial of the motion for recusal, the court entertained interlocutory review. The court noted that the test for disqualifying a commissioner in *adjudicative* proceedings is prejudgment. But in rulemaking or legislative proceedings, including ratemaking, the Court found that the test is whether there has been a clear and convincing showing that the official has an "unalterably closed mind" on critical matters. Applying this test, the court held the commissioner disqualified from pending dockets, but not from future ones.

Similarly, *Tennessee Cable Television Ass'n v. Public Service Comm'n*, 844 S.W.2d 151 (Tenn. Ct. App. 1992), *review denied* (Tenn. 1992), held that the test for disqualifying a commissioner from rulemaking is an "unalterably closed

mind." The court found no grounds for disqualification in that case.

The Illinois court in *Business and Professional People for the Public Interest v. Barnich*, 614 N.E.2d 341 (Ill. App. Ct. 1993), ordered the recusal of a state commerce commissioner for bias because he admitted to having numerous ex parte communications with officials of a utility company under rate review by the commission. The appeals court determined the issue of recusal on the basis of state statutes which required the agency decisionmaker to avoid the appearance of impropriety. The state Administrative Procedure Act, applicable to the Illinois commission, prevented ex parte communication with parties to a contested case about issues involved in the matter. The court considered the commissioner to have a duty to recuse himself.

The Oklahoma decision in the instant case conflicts with those other state courts only to the extent they entertained interlocutory judicial review of actions by commissioners denying motions for recusal. This conflict is not, however, an appropriate basis for this Court to grant SWB's Petition for Writ of Certiorari, because (1) the conflict is based substantially on state law (the decision of the Illinois court was based on statutes which established an appearance of impropriety standard not applicable to the Oklahoma commission); (2) the factual record in this case falls far short of meeting the "unalterably closed mind" test adopted by the South Dakota and Tennessee courts; (3) there is no indication that state courts need guidance on this issue; and (4) the Oklahoma Supreme Court's decision in this case is not a final order,

and is therefore ineligible for review by this Court. *See* I, *supra*.

In fact, most of the state authorities reviewed by SWB in its Petition (Pet. at 16, n.4) agree with the rationale of the Oklahoma Supreme Court. Several explicitly reject the concept of adopting extensive "trial-type" due process procedures in individualized ratemaking proceedings. *See, e.g., Ratepayers Coalition of Rochester v. Rochester Electric Light and Power Company*, 571 A.2d 606 (Vt. 1989); *Gulf States Utilities Company v. Louisiana Public Service Commission*, 578 So.2d 71, 79-84 (La. 1991); *Earle M. Jorgensen Co. v. City of Seattle*, 665 P.2d 1328 (Wash. 1983).

IV. THE STATE COURT HAS CORRECTLY DECIDED THE FEDERAL CONSTITUTIONAL ISSUE.

As demonstrated above, the Oklahoma Supreme Court's decision does not conflict with any of this Court's precedents. Furthermore, the Oklahoma Supreme Court correctly decided the federal constitutional issue.

A. The state court properly held that ratemaking is legislative, and the court adequately protected the due process rights of the utility.

The Oklahoma Supreme Court's decision in this case correctly characterized ratemaking as legislative. *See* III, *supra*.

The Oklahoma Supreme Court denied SWB's interlocutory petition to recuse a commissioner, but stated that SWB will be able to appeal from the final rate order on

two interrelated grounds: (1) if the end result is unreasonable or confiscatory, or (2) if the procedure violated the requirements of fundamental fairness by denying SWB a proper opportunity to create a fair record during the presentation of its case to the Corporation Commission. The Oklahoma Supreme Court indicated it will provide independent review of the final rate order, but will not provide interlocutory review. Due process requires no more than this. *See* III, *supra*; *West Ohio Gas Co. v. Public Utilities Comm'n*, 294 U.S. 63 (1935); and *Ohio Bell Tel. Co. v. Public Utilities Comm'n*, 301 U.S. 292 (1937).

B. Assuming due process requires ratemaking to be characterized as something other than legislative, the state court committed harmless error.

Assuming, *arguendo*, that due process requires ratemaking to be characterized as something other than legislative, the Oklahoma court committed harmless error in characterizing ratemaking as legislative. This is true whether due process requires ratemaking to be characterized as rulemaking or as adjudicative.

1. If individualized ratemaking is rulemaking.

Assuming due process requires individualized ratemaking to be regarded as rulemaking, this Court has provided no precedent for determining the standard for recusal, or for determining whether due process requires a state court to exercise interlocutory review of disputes about recusal. According to the two state courts that have addressed the issue recently, the standard for recusal in

ratemaking, when the ratemaking is regarded as a rulemaking proceeding, is an "unalterably closed mind." *Northwestern Bell Tel. v. Stofferahn*, 461 N.W.2d 129 (S.D. 1990); *Tennessee Cable Television Ass'n v. Public Service Comm'n*, 844 S.W.2d 151 (Tenn. Ct. App. 1992) *review denied* (Tenn. 1992). *See also Association of National Advertisers, Inc. v. Federal Trade Comm'n*, 627 F.2d 1151 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 921 (1980). The record in this case does not establish that Commissioner Anthony had an unalterably closed mind.

2. If individualized ratemaking is adjudicative in nature.

As an even more remote possibility, if due process requires ratemaking to be characterized as adjudicative, the standard for this Court to review a decision of a state court or agency on recusal in adjudicative proceedings is extremely limited. *See Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986). That opinion included an extensive discussion of bias and financial interest, emphasizing the deference due state courts, though holding that a justice of the Alabama Supreme Court should have recused himself from participating in a case of first impression regarding the availability of punitive damages against an insurance company for bad-faith refusal to settle a claim, when the justice had a personal claim pending against another insurance company at the same time, and the justice's personal claim was affected by the outcome of the case before the court. The record in the instant case does not establish that Commissioner Anthony should be recused under this standard.

A distinction must be made between due process cases, such as *Aetna Life*, and cases applying statutory grounds for disqualification of federal judges or officers. *See, e.g., Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988); *Liteky v. United States*, 114 S. Ct. 1147 (1994). Cases requiring recusal on statutory grounds do not control this case; *Aetna Life* controls.

The two primary Fourteenth Amendment due process cases involving review of state proceedings which are most frequently cited by SWB are *Gibson v. Berryhill*, 411 U.S. 564 (1973) and *Ward v. Village of Monroeville*, 409 U.S. 57 (1972). Neither case helps SWB's argument. In both cases, the pivotal issue was the existence of a personal and pecuniary interest in the outcome of the proceeding. Commissioner Anthony has no personal and pecuniary interest in the outcome of the SWB proceeding.

A second category of Fourteenth Amendment due process cases is cited by SWB, particularly *In Re Murchison*, 349 U.S. 133 (1955), in which judicial officers, involved in state prehearing procedures for criminal contempt determinations, developed significant bias because of prejudgment of facts about defendants they would eventually try for the charged offense. The facts of the instant case do not support a conclusion that Commissioner Anthony has prejudged issues in the pending rate case, or that he maintains a personal or pecuniary interest in the outcome.

An Oklahoma corporation commissioner possesses investigative and decision-making authority over regulated public service companies. *See* Okla. Const., art. IX, §§ 18 and 28. Therefore, the cases which are far more

relevant to the facts of this case, if ratemaking is considered adjudicative, are *Withrow v. Larkin*, 421 U.S. 35 (1975) and *Hortonville Joint School District v. Hortonville Education Association*, 426 U.S. 482 (1976), where it was recognized that the combination of investigative and adjudicative functions within a state administrative agency does not violate Fourteenth Amendment due process standards.

CONCLUSION

For the reasons stated herein, this Court should deny SWB's Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: August 12, 1994